01 557 AUG 06 2001
OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

DONALD STEPHEN ERMERT,)
)
Petitioner,)
)
v.)
)
ROBERT L. AYERS, Warden,)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL J. McCABE
Attorney for Petitioner
California Bar No. 54078
2442 Fourth Avenue
San Diego, CA 92101-1609
(619) 231-1181

Attorney for Petitioner
DONALD STEPHEN ERMERT

67pp

QUESTIONS PRESENTED FOR REVIEW

A. **Whether a certificate of appealability should issue to permit appellate review of petitioner's claim that the introduction of propensity evidence admitted at petitioner's trial was dissimilar and irrelevant as to consent, the only contested issue, thereby depriving petitioner a fundamentally fair trial guaranteed by due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.**

B. **Whether a certificate of appealability should issue to permit appellate review of petitioner's claim that introduction of petitioner's assault with a deadly weapon conviction, which was non-sexual on its face, was improper, thereby depriving**

petitioner of a fundamentally fair trial as protected by the Fifth and Fourteenth Amendments to the United States Constitution.

C. Whether a certificate of appealability should issue to permit appellate review of petitioner's claim that the evidence adduced at petitioner's trial was insufficient as a matter of law to sustain his convictions.

TABLE OF CONTENTS

Questions Presented for Review i

Table of Contents iii

Table of Authorities v

Opinions Below 2

Jurisdiction 2

Constitutional and Statutory Provisions Involved vi

Statement of the Case 3

Reasons for Granting the Writ 10

1. **The introduction of petitioner's uncharged prior sexual acts was improper because they lacked sufficient similarity to be probative. This Court should remand this case to the United States Court of Appeals for the Ninth Circuit for the issuance of a certificate of appealability because reasonable jurists can debate (1) whether the prior sexual acts were similar in this case, and (2) what factors courts should look to when determining similarities.** 10

2. **The introduction of petitioner's assault with a deadly weapon conviction was improper because the conviction did not involve sexual conduct. This Court should remand this case to the United States Court of Appeals for the Ninth Circuit for the**

issuance of a certificate of appealability because reasonable jurists can debate whether (1) the introduction of a non-sexual conviction was proper in this case, (2) the assault upon Ms. Hughes was similar enough to be constitutionally admissible. 14

3. The evidence adduced at petitioner's trial was insufficient as a matter of law to sustain his convictions. For this additional reason, this Court should remand this case to the United States Court of Appeals for the Ninth Circuit for the issuance of a certificate of appealability. 17

CONCLUSION 21

DECLARATION OF SERVICE

APPENDIX A

APPENDIX B

TABLES OF AUTHORITIES

United States Supreme Court

Estelle v. McGuire,
502 U.S. 62 (1991) 19

Hohn v. United States,
524 U.S. 236 (1998). 2

Jackson v. Virginia,
443 U.S. 307, 319 (1979). 15

Slack v. McDaniel,
529 U.S. ___, 120 S.Ct., 1595 (2000). 10

Circuit Courts

Doe v. Rudy-Glanzer, 232 F.3d 1258,
1268-1269 (9th Cir., 2000). 11

United States v. Delmerle,
99 F.3d 80, 85 (2nd Cir., 1999). 12

United States. v. Meacham,
115 F.3d 1488, 1494 (10th Cir.,1997). 11

United States v. Gabe,
237 F3d 954, 959 (8th Cir., 2001). 11

United States v. McHorse,
179 F.3d 889 (10th Cir. 1999). 19

District Courts

United States v. Guardia, 955 F.Supp 115 (D.N.M.) 20

State Courts

Commonwealth v. English,
993 S.W. 2d 941, 945 (Ky., 1999) 11

DeVonish v. State,
500 S.W. 2d 800,801 (Tex. Crim. App. 1973).....11

Dupree v. State,
543 So. 2d 125, 128 (Fla.
App. 1 District 1994).. 14

People v. Falsetta, 21 Cal. 4th 903, 911 (1999) 12

People v. James, 81 Cal. App. 4th 1343 (2000) 20

State v. Halstein, 857 P.2d 270 (Wash., 1993). 16

State v. Hammer, 613 N.W. 2d 629,
634-635 (Wis. 2000). 12

State v. Howell, 557 N.W. 2d 908, 912
(Iowa At. App. 1996). 10

State v. Patterson, 963 P.2d 436 (Kan. App. 1998). 17

State v. Jackson, 689 P. 2d 76 (Wash., 1984) 15

United State Constitution

United States Constitution, Amendment V. 4

United States Constitution, Amendment XIV. 2

Statutes and Rules

28 U.S.C. § 1251(1).. 2

28 U.S.C. § 2253(c) 3,6

California Penal Code §§ 236, 237 4

California Penal Code § 288(a). 4

RCW 13.40.135. 16

K.S.A. 22-4902(b)(12). 16

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

DONALD STEPHEN ERMERT,	)
	)
Petitioner,	)
	)
v.	)
	)
ROBERT L. AYERS, Warden,	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The petitioner, Donald Stephen Ermert, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit directing that Court to issue a certificate of appealability and to entertain petitioner's appeal on the merits.

Opinions Below

The order of the United States Court of Appeals for the Ninth Circuit denying petitioner's request for a certificate of appealability is attached as Appendix A. The memorandum decision and order of the United States District Court denying the petition for writ of habeas corpus is attached as Appendix B.

Jurisdiction

The United States Court of Appeals for the Ninth Circuit issued the order denying the petitioner's request for a certificate of appealability on May 7, 2001. This Court has jurisdiction under 28 U.S.C. § 1251(1) to review denials of certificates of appealability. Hohn v. United States, 524 U.S.

236, (1998).

Constitutional and Statutory Provision Involved

United States Constitution, Amendment V: "[N]or be deprived of life, liberty, or property, without due process of law."

United States Constitution, Amendment XIV: Same.

28 U.S.C. §1251: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case . . . ."

28 U.S.C. § 2253(c): "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right."

Statement of the Case

a. Facts surrounding the charged offenses

On February 14, 1996, a San Diego County jury

convicted petitioner of violation of the personal liberty of another by violence, menace, fraud, and deceit in violation of California Penal Code §§ 236, 237 (Count 1), and oral copulation against the will of another by force, violence, duress, menace, and threat of immediate and unlawful bodily injury in violation of California Penal Code § 288a (Count 2). Petitioner was sentenced to 21 years in custody on March 13, 1996.

Petitioner and Jackie Holman, the victim of the alleged conduct, had been acquainted for five years at the time of the incident in question. [R.T.[1] 45-47] Ms. Holman, a prostitute and a daily user of cocaine and heroin [R.T. 46, 88], had previously charged Mr. Ermert for sex. But, as they became good friends [R.T. 49], she no longer charged petitioner, and frequently initiated sexual relations with him. [R.T. 49, 92-93]

---

[1] "R.T." Refers to the Reporter's Transcript of petitioner's trial in the San Diego County Superior Court.

On or about October 10 or 11, 1995, Ms. Holman, whose lengthy criminal record includes felony convictions for armed robbery and possession of cocaine [R.T.46], recently having been released from custody, and under the influence of drugs [R.T. 87-91], called Mr. Ermert under the assumption that they would have sex that night. [R.T. 50-52]

Mr. Ermert picked up Ms. Holman in his van and took her back to the apartment he shared with his roommate, Paul Masterson. [R.T. 50-52, 205-208]. Mr. Masterson was home during all relevant times [R.T. 205-208], and the couple proceeded into Mr. Ermert's bedroom where they undressed. [R.T. 52-53]

Mr. Ermert and Ms. Holman had engaged in domination and bondage during previous sexual encounters, [R.T. 55, 89, 97, 223-224] involving her being tied up, handcuffed, clothes pins being put on her breast, and spanking. Id.

During the present encounter, Ms. Holman got onto

the bed and let Mr. Ermert handcuff her and tie her up. [R.T. 52-55] Mr. Ermert struck her in the stomach with a strap at some point, whereupon Ms. Holman asked him to stop. [R.T. 61-62]. He complied, but later hit Ms. Holman again.

As previously, Mr. Ermert gagged Ms. Holman and placed clothes pins on her breast and vaginal area. [R.T. 66-67]. However, on this occasion Ms. Holman became tearful and "pissed off" because of the pain. [R.T. 70, 89] She was also angry and somewhat fearful because she felt like she lost control of the situation [R.T. 59-60, 110], which feeling was intensified by her recent use of narcotics after being clean for a period of time. [R.T. 109]. However, she did not think Mr. Ermert was going to hurt her. [R.T. 59-60, 110].

After she was tied up for about 30 to 45 minutes [R.T. 70], petitioner released Ms. Holman and asked her for oral sex, which she performed. [R.T. 70-71, 92-93] During all this time, Mr. Masterson was present and did not hear anything such as crying or yelling, which he believed he would have

been able to hear. [R.T. 205-208]

However, upon returning home Ms. Holman was compelled to explain the marks on her body to her boyfriend. Ms. Holman knew he would be upset if the sex was consensual [R.T. 93-94, 200] so she told him that Mr. Ermert had forced her into it and that she didn't resist in order to protect herself. [R.T. 113].

"Pushed into it" by her boyfriend, Ms. Holman contacted police on October 13, 1995. [R.T. 73-74]. While Ms. Holman told Det. Bristol petitioner pulled a knife on her, [R.T. 139-173] she admitted during her trial testimony that she embellished her story, and that there was never a knife involved. [R.T. 83, 95, 109].

b. The Propensity Evidence

i. Ms. Whitish

At some time during January, 1992, at 9:15 p.m., Michelle Whitish was walking to her friend's hotel room in the 4300 block of 70th street in San Diego, when a man she had

never seen before, later identified at trial as petitioner, jumped out of the bushes and held a knife to her side. [R.T. 129]

Petitioner forced Ms. Whitish into the cab of his truck and began to drive. He put her head into his lap, held the knife to her throat, and told her to orally copulate him. [R.T. 130-131] After Ms Whitish complied with petitioner's demand, he stopped driving, and threatened to hit her if she started crying. [R.T. 131-132]

Petitioner then obtained a gag from the back of his truck, handcuffed Ms. Whitish, and made her orally copulate him. Ms. Whitish asked petitioner to wear a condom, [R.T. 136] and afterwards told him where she lived in order for him to drop her off. [R.T. 141]. Due to outstanding warrants, she did not immediately report the incident, and petitioner was never charged. [R.T. 2]

ii Ms. Hughes

In May, 1992, at about 10:30 p.m., Cynthia Ann Hughes, while high on heroin, was working as a prostitute on

El Cajon Boulevard in San Diego. [R.T. 148, 159] Petitioner, driving a red pickup truck with a camper shell, slowed to a stop near her. [R.T. 148-150,159]. They eventually agreed upon a price for her services, and drove to a mutually agreed upon location. [R.T. 148-150]

Ms. Hughes took off her clothes, while petitioner (fully clothed) climbed on top of her and reached into a bag pulling out a knife. [R.T. 153-154]. He held the knife to her throat and waved it back and fourth around her face. Id.

Ms. Hughes said, "My God, don't kill me. Don't hurt me, you know. This was not part of the agreement." [R.T. 154]. Petitioner replied, "Shut up, don't scream, don't say a word and I won't hurt you. Just shut up." [R.T. 154]. After about five to ten minutes he let her up [R.T. 155], and told her to roll over to her stomach. She refused, he demanded his money back, and she complied. [R.T. 156]. They never had sex. [R.T. 156-159]. Petitioner was convicted of assault with a deadly weapon in violation of California Penal Code

§245(a)(1). [R.T. 3].

The State relied heavily on the testimony of Ms. Whitish and Ms. Hughes to counter Ms. Holman's testimony. The proffered basis for admissibility was that if Ms. Whitish and Ms. Hughes did not consent to petitioner's conduct, Ms. Holman did not consent either. [R.T. 261-262].

Reasons for Granting the Writ

The introduction of petitioner's uncharged prior sexual acts was improper because they lacked sufficient similarity to be probative. This Court should remand this case to the United States Court of Appeals for the Ninth Circuit for issuance of a certificate of appealability because reasonable jurists can debate (1) whether the prior sexual acts were similar in this case, and (2) what factors courts should look to when determining similarities.

This Court has recently set forth the standard for evaluating whether a certificate of appealability should issue to a habeas petitioner in order to permit his appeal to go forward pursuant to the provisions of 28 USC § 2253(c)(2). Slack v. McDaniel, 529 U.S. __, 120 S.Ct, 1595 (2000).

"Where a district court has rejected constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 120 S.Ct. at 1604.

State and Federal courts have overwhelmingly found that in order to be admissible, uncharged allegations of prior sexual conduct must be similar to the charged crimes. United States v. Delmerle, 99 F.3d 80, 85 (2nd Cir., 1999); United States v. Gabe, 237 F.3d 954, 959 (8th Cir., 2001); Doe v. Rudy-Glanzer, 232 F.3d 1258, 1268 (9th Cir., 2000); United States v. Meacham, 115 F.3d 1488, 1494 (10th Cir., 1997); Commonwealth v. English, 993 S.W. 2d 941, 945 (Ky., 1999); State v. Hammer, 613 N.W. 2d 629, 634-635 (Wis. 2000); State v. Howell, 557 N.W. 2d 908, 912 (Iowa At. App. 1996). The California Supreme Court, however, has approved the admission of evidence of prior sexual misconduct without

a showing of similarity in a sex prosecution. People v. Falsetta, 21 Cal. 4th 903, 911 (1999).

Some factors are of greater importance when determining whether the alleged incidents of prior misconduct lack similarity, and thus the risk of prejudice outweighs the probative value of the evidence. Doe v. Rudy-Glanzer, 232 F.3d at 1269. In that case, the plaintiff sought to introduce evidence of the defendant's alleged sexual assault upon his 12-year-old niece at a family party during a civil trial for allegedly molesting his 3-year-old daughter. The district court reasoned that while the incidents had certain similarities, as both incidents involved minor girls related to the defendant, there were several important differences. The location of the assaults was different, one occurring in public at a family party and the other in private. The assault on the grandchild also allegedly involved the use of a weapon, unlike the assault upon the niece, and the age of the victims was significantly different. The Ninth Circuit endorsed this view. Id. at 1270.

In the present case, the attack on Ms. Whitish differed from the incident with Ms. Holman in similar significant ways. The locations differed in that Ms. Whitish was attacked in the relative "privacy" of a truck [R.T. 129], whereas petitioner and Ms. Holman had sex at his apartment with his roommate present. [R.T. 205 -208] Location is very important in establishing a common plan or theme. DeVonish v. State, 500 S.W. 2d 800,801 (Tex. Crim. App. 1973). Additionally, Ms. Whitish's attacker used a knife. [R.T. 130-131]. Ms. Holman did make statements to Det. Bristol concerning a knife. [R.T. 139-173] Yet, she denied that petitioner used a knife during her trial testimony. [R.T. 83, 95, 109]. Finally, Mr. Ermert and Ms. Holman were involved in an ongoing relationship [R.T. 45-47] unlike Ms. Whitish who had never seen her attacker before the night of the attack. [R.T. 129]. Thus, the introduction of this evidence shed no light upon the only contested issue in the case, consent, but was extremely prejudicial.

Under these circumstances, a certificate of appealability should issue because reasonable jurists would, at least, find it debatable whether the introduction of this evidence deprived petitioner of his fundamental right to a fair trial as guaranteed by the due process clause.

Petitioner's assault with a deadly weapon conviction was improperly admitted because the conviction did not involve sex. This Court should remand this case to the United States Court of Appeals for the Ninth Circuit for issuance of a certificate of appealability because reasonable jurists can debate whether (1) the introduction of a non-sexual conviction was proper in this case and, (2) the assault upon Ms. Hughes was similar enough to be constitutionally admissible.

Rules regarding the introduction of evidence in cases involving sexual crimes cannot be used to allow the introduction of nonsexual crimes. State v. Jackson, 689 P. 2d 76, 79 (Wash., 1984); Dupree v. State, 543 So. 2d 125, 128 (Fla. App. District 1 1994).

In State v. Jackson, the Supreme Court of Washington found that the trial court improperly admitted into

evidence an assault involving a minor girl during the defendant's trial involving an attack on two girls. The previous incident merely established simple assault, not sexual contact. Thus, the Court held that the evidence was improperly admitted, but found the error to be harmless under the circumstances of that case. Id. at 79-80.

Here, petitioner and Ms. Hughes (a prostitute) made an agreement regarding sex. [R.T. 148-150] and proceeded to a secluded location, where the victim undressed. [R.T. 150-152]. Petitioner pulled out a knife, held the victim down, and told her to shut up. [R.T. 154]. He then commanded Ms. Hughes to roll over on her stomach, and when she refused he asked for his money back and she left. [R.T. 156-159]. For this incident, petitioner was convicted of assault with a deadly weapon.

This conviction was not one involving sex, and therefore should not have been admitted under the authority set forth above. See also, State v. Halstein, 857 P.2d 270

(Wash., 1993) discussing R.C.W .(Revised Code of Washington) 13.40.135; State v. Patterson, 963 P.2d 436 (Kan. App. 1998) discussing K.S.A. (Kansas Statutes Annotated) 22-4902(b)(12). The contrary holding in petitioner's case was plainly wrong.

Apart from this error, the evidence of this assault was also improperly admitted, as it lacked sufficient similarity to the charged offenses to be probative. Doe v. Rudy-Glanzer, supra at 1269. Important differences existed between the uncharged allegations and the conduct charged. The assault with a deadly weapon upon Ms. Hughes occurred in relative privacy, [R.T. 150-152] and by definition involved the use of a weapon. There was no previous relationship between Ms. Hughes and the defendant. For these reasons, this evidence had no relevance to the disputed issue of consent. It served only to establish that petitioner was an unsavory individual in violation of his right to an unbiased assessment of his guilt of the charged offenses as guaranteed by due process. Because

reasonable jurists would, at least, find it debatable whether this state of affairs rendered petitioner's convictions constitutionally infirm, a certificate of appealability should issue.

The Evidence adduced at Petitioner's trial was insufficient as a matter of Law to Sustain his convictions.

A. The evidence presented was insufficient as a matter of law.

The standard for assessing the legal sufficiency of the evidence is, "Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). The testimony at trial revealed a conflict, not between petitioner and Ms. Holman, but between Ms. Holman's trial testimony and Ms. Holman's statements to Detective Bristol during a police interview in which Ms. Holman admittedly exaggerated to the police [R.T. 83, 95, 109] after being forced

to report her encounter with petitioner to the police by her boyfriend. [R.T. 73-74] The key conflicts in the two versions related to the use of a knife, petitioner's demand for oral copulation, and, most importantly, whether petitioner's conduct was consensual.

Ms. Holman offered reasonable explanations as to why she changed her account of the night in question. She testified that she was afraid of her boyfriend and what he would do if he knew the sex was consensual. [R.T. 93-94, 220]. Accordingly, she told him she didn't resist in order to protect herself. [R.T. 113] The only occasions where Ms. Holman accused petitioner of the crimes charged were in her boyfriend's presence [R.T. 73-75, 108] and with the police and her boyfriend present. [R.T. 163] Viewing the evidence in the light most favorable to the prosecution, the statements made to police by Ms. Holman were undercut to such a degree that they are not sufficient under the Jackson standard to support petitioner's convictions.

B. While petitioner vigorously maintains that evidence of the other sexual assaults was improperly admitted, the evidence was insufficient as a matter of law even if this evidence is considered.

The use of propensity evidence cannot alone meet the prosecution's burden of proof beyond a reasonable doubt . United States v. McHorse, 179 F.3d 889, 897 (10th Cir. 1999); People v. James, 81 Cal. App. 4th 1343, 1353 (2000); Estelle v. McGuire, 502 U.S. 62, 78 (1991) (Justice O'Connor, with whom Justice Stevens joined, concurring in part and dissenting in part, expressing concerns about the State reducing its burden of proof by the use of propensity evidence).

Here, petitioner's sexual preference to engage in domination and bondage [R.T. 55, 89, 97, 233-224] obviously confused the jury and prejudiced petitioner. The sex between petitioner and Ms. Holman was admittedly painful to her [R.T. 70, 89], but that factor did not render the conduct non-consensual. The danger is that the trier of fact mistook the

painful nature of the sexual acts as signifying a lack of consent. See, United States v. Guardia, 955 F.Supp. 115, 118 (D.N.M.).

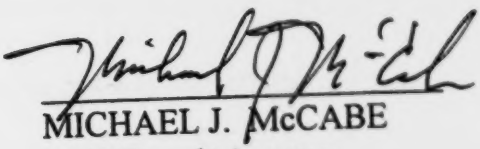
In any event, the admission of the other crimes evidence here did not render the otherwise insufficient evidence sufficient to satisfy the Jackson standard, requiring the issuance of a certificate of appealability on this issue as well.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits the petition for writ of certiorari should be granted.

Dated: August 3, 2001

Respectfully submitted,



MICHAEL J. McCABE
2442 Fourth Avenue
San Diego, CA 92101-1609
Telephone: (619) 231-1181
Attorney for Petitioner
DONALD STEPHEN ERMERT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD STEPHEN ERMERT, Petitioner-Appellant, v. ROBERT AYERS, Warden, Respondent-Appellee.	No. 00-56072 DC# CV-98-02235-JM Southern District of California (San Diego) ORDER

FILED
MAY - 7 2001
CATHY A. CATTERSON CLERK
U.S. COURT OF APPEALS

Before: SNEED and RYMER, Circuit Judges

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DONALD STEPHEN ERMERT, Plaintiff, Vs ROBERT L. AYERS, WARDEN, Defendant.	CASE NO. 98CV2235 JM (JAH) ORDER DENYING EX PARTE APPLICATION FOR CERTIFICATE OF APPEALABILITY

As petitioner has not made a substantial showing of the denial of a constitutional right, the request for a certificate of appealability is denied.

See 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED: 6/14, 2000

FILED
00 JUN 15 PM 7:34

JEFFREY T. MILLER
United States District Judge

cc: All parties

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DONALD STEPHEN ERMERT, Petitioner, vs. ROBERT L. AYERS, Warden, Respondent.	CASE NO. 99CV2235 JM (JAH) ORDER ADOPTING REPORT AND RECOMMENDATIO N AND DENYING PETITION FOR WRIT OF HABEAS CORPUS

FILED
00 MAY 11 AM 8:37
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: DEPUTY

Petitioner, Donald Stephen Ermert, a state prisoner, filed a habeas corpus action pursuant to 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). Petitioner raises two grounds for relief: (1) that petitioner was denied due process of law when the trial court admitted unduly prejudicial evidence of other acts not relevant to an essential element of the crime, and (2) that the conviction was

not supported by sufficient evidence. The court has reviewed the petition for writ of habeas corpus, the answer to the petition and the lodgements in support thereof, the traverse, the supplemental response to the petition, the supplemental traverse, the magistrate judge's thorough report and recommendation and petitioner's objections thereto. For the reasons set forth below, the court adopts the report and recommendation and denies the petition.

ANALYSIS

As noted by the magistrate, pursuant to 28 U.S.C. § 2254(d), a petition for writ of habeas corpus is not to be granted unless the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Admission of other acts evidence.

A petitioner who challenges a state court's evidentiary ruling is not entitled to relief unless the ruling "violates federal law by either infringing on a federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process." Walters v. Maass, 45 F.3d 1355, 1357 (9th cir. 1995) (citing Pulley v. Harris, 465 U.S. 37, 41 (1984)). Thus, the state court's ruling must stand unless the admission of evidence was arbitrary or "so prejudicial that it rendered the trial fundamentally unfair." Id.

Here, Ermert has failed to demonstrate that, in light of Supreme Court precedent, the admission of the prior bad act testimony in this case was so prejudicial that it rendered the trial "fundamentally unfair." To understand why the admission of the testimony of these two witnesses was not improperly admitted, the court considers the testimony of the victim as well as the individuals testifying to the prior bad acts.

At petitioner's trial, the victim, Jackie Holman,

testified that she and Ermert had known each other for some time and were friends. Holman testified that she would on occasion have sex with Ermert for money. On the night in question, Holman met Ermert and went back to his place. The two got undressed and she got on the bed on her stomach. Ermert then tied her up with a rope and put handcuffs on her wrists behind her back. As Holman described it, she was "hog tied." Although at first she did not object, after awhile Holman did not want to be in that siutation because she felt that she had no control. In the past, Ermert did not make her feel like she had no control. Holman told Ermert to stop doing what he was doing and in response Ermert punched Holman in the stomach. He then hit her with a strap or something similar. Later, Ermert put a ball-gag in Holman's mouth against her will. Holman began crying, and Ermert said "bitch, shut up." Ermert then took out clothes pins and placed them on various parts of Holman's body. The clothes pins hurt, and Holman was still crying. Ermert had tried doing that

to Holman before, but Holman had made clear she did not like it. Finally, Ermert took the gag out of Holman's mouth and Holman performed oral sex on Ermert. Ermert then let Holman leave.

Michelle Whitish testified that one night Ermert jumped out of a bush and put a knife to her side. He then forced her into his truck, where he made her give him oral sex. Whitish began crying. Ermert told her to "shut up." He then slapped her in the face and punched her in the stomach. Later, he put a ball gag in her mouth and handcuffed her hands behind her back. He then removed the gag and forced her to perform oral sex. He then attempted to engage in intercourse with Whitish. Finally, after a couple hours, defendant let Whitish go.

Cynthia Ann Hughes testified that one night she was working as a prostitute when she was approached by Ermert, who was driving a red pickup truck. Ermert indicated he wanted a "half and half," which meant he wanted both

intercourse and oral sex. Hughes agreed to perform these acts for $40. Hughes got in Ermert's truck, and they drove to a parking lot. Ermert gave Hughes $40, and Hughes took off her clothes. Ermert then laid Hughes down on her back and sat on top of her with his clothes on. Hughes could not move and was scared because this was not typical behavior. Ermert then took a knife out of a bag and moved it back and forth around her face and throat. Hughes begged Ermert not to hurt her, and Ermert told her to "shut up" and he would not hurt her. Ermert then tried to make Hughes get on her stomach but she refused. Hughes kept telling Ermert that her boyfriend had been watching her and knew she was with him. Ermert finally demanded his money back and let Hughes go.

As he did in his traverse, petitioner in his objections to the report and recommendation contends that the admission of the prior acts testimony was not relevant to the issue of consent and "served only to demonstrate petitioner's pre-disposition to attack women." Objections, p.3. The court

disagrees. Consent was very much an issue in the case, especially given Ms. Holman's previous consensual contacts with Ermert. Thus, the fact that Ermert had engaged in similar acts with Ms. Whitish on a non-consensual basis suggests a pattern of behavior or modus operandi on Ermert's part that is highly relevant to the issue of whether Ms. Holman consented. See Colley v. Summer, 784 F.2d 984, 990 (9th Cir. 1986) (prior bad acts testimony relevant to prove intent and identity where both women were taken out driving, they were assaulted within roughly the same place, the attack was commenced by choking, and the defendant expressed remorse, distress and confusion during or after the act). Moreover, although defendant did not actually engage in any sexual acts with Ms. Hughes, the evidence demonstrated that what started out as a consensual encounter became a non-consensual encounter, just as the prosecutor contended was the case with Ms. Holman. Finally, the trial judge gave a limiting instruction to the jury that helped ensure

that the challenged evidence was not considered for an improper purpose.

In sum, the court finds that Ermert's federal constitutional rights were not violated by the introduction of this evidence.

Insufficiency of the evidence

The standard for determining whether a federal constitutional violation has occurred in the face of a claim of insufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443, U.S. 307, 319 (1979).

Ermert was convicted of false imprisonment in violation of Cal. Penal Code § 236 and forcible oral copulation in violation of Cal. Penal Code § 288a. False imprisonment is the unlawful violation of the personal liberty of another. Cal. Penal Code § 236. Ms. Holman testified

that she was "hog tied," and although at first she did not object, after awhile she did not want to be there because she felt that she had no control. Ms. Holman told Ermert to stop doing what he was doing and in response Ermert punched Holman in the stomach. He then hit her with a strap or something similar. Later, Ermert put a ball-gag in Holman's mouth against her will. On re-direct, Ms. Holman testified that had she known that Ermert was going to hog-tie her, place a gag in her mouth and use clothes pins on her she never would have gone to defendant's place. A rational trier of fact, confronted with the testimony of Ms. Holman, could have found that Ms. Holman's personal liberty was unlawfully violated by Ermert.

Cal. Penal Code § 288(c)(2) makes it unlawful for any person who to commit "an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful body injury." Ms. Holman admitted that she told the police

that the reason she engaged in oral copulation with defendant was that she was scared and "just wanted to get the hell out of there." A rational trier of fact could have found that Ms. Holman engaged in oral copulation and that the act was accomplished against her will by means of duress.

In sum, the court finds that there was sufficient evidence to sustain Ermert's convictions such that no federal constitutional violation occurred.

CONCLUSION

For the reasons set forth above, the court adopts the magistrate judge's report and recommendation and denies the petition for writ of habeas corpus. The clerk shall terminate this action accordingly.

IT IS SO ORDERED.

DATED 5/10/2000

JEFFREY T. MILLER
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DONALD STEPHEN ERMERT, Plaintiff, Vs ROBERT L. AYERS, WARDEN, Defendant.	CASE NO. 98CV2235 JM (JAH) ORDER DENYING EX PARTE APPLICATION FOR CERTIFICATE OF APPEALABILITY

As petitioner has not made a substantial showing of the denial of a constitutional right, the request for a certificate of appealability is denied.

See 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED: 6/14, 2000

FILED
00 JUN 15 PM 7:34

JEFFREY T. MILLER
United States District Judge

cc: All parties

Attorney filed an information, charging petitioner with one count of false imprisonment by violence in violation of Penal Code section 236/237 and one count of forcible oral copulation in violation of Penal Code section 288a(c). On February 7, 1996, a jury convicted petitioner of all counts. The information also alleged petitioner suffered a serious felony prior conviction and a Three Strikes prior conviction within the meaning of Penal Code sections 667(a)(1); 667(e); and 1192.7(c)(2)(3). After a bifurcated court trial on the truth of prior conviction allegations, the trial court found petitioner had previously suffered a serious felony conviction. On March 13, 1996, the court sentenced petitioner to prison for twenty-one years.

On April 2, 1996, petitioner appealed his conviction to the California Court of Appeal, alleging (1) there was insufficient evidence to support his conviction; (2) the trial court improperly admitted evidence of other crimes; (3) the trial court erred in instructing the jury on those prior acts; (4) the court erred in refusing to instruct the jury on the lesser included offense of false imprisonment; (5) prosecutorial misconduct deprived petitioner of a fair trial; (6) he received ineffective assistance of counsel; (7) the trial court improperly

sentenced him to the upper base term of sixteen years and five years consecutive for the serious felony prior; (8) the combination of errors in this case requires reversal; and (9) the revocation of his probation must be set aside because it was based on a conviction that must be reversed.

On November 25, 1997, the California Court of Appeal affirmed, finding sufficient evidence to support the conviction and that the evidence of prior crimes was properly admitted to prove a common plan or design and intent pursuant to Cal. Evid. Code §§ 1108 and 1101(b). The court further determined there was no prosecutorial misconduct or sentencing error and that petitioner received effective assistance of counsel.

On December 30, 1997, petitioner filed a petition for review in the California Supreme Court, alleging (1) Evidence Code section 1108 is unconstitutional because it permits the admission of character evidence to prove the defendant committed the crime charged; (2) the trial court erred in admitting the prejudicial evidence of prior crimes; (3) prosecutorial misconduct deprived him of a fair trial; and (4) there was insufficient evidence to support the conviction. On March 11, 1998, the California Supreme Court denied the

petition for review without opinion.

On December 10, 1998, petitioner filed the instant Petition for Writ of Habeas Corpus.

B. Statement of Facts

The following facts are taken verbatim from the California Court of Appeal's unpublished opinion, filed on November 24, 1997, in People v. Ermert, No. DO25801:

> ... on or about October 12, 1995, Jacqueline Holman reported to the police that Ermert had restrained her at his apartment on October 10 or 11, 1995, by hog-tying and gagging her, and then had beat her and put clothes pins on part of her body, causing her pain and welts. Holman was allowed to leave Ermert's place after she performed an act of oral copulation on him.
>
> On October 16, 1995, San Diego Police Detective Russell Dean Bristol and another officer on the vice squad conducted a further investigation. Holman told Bristol Ermert had punched her in the stomach, thrown her on his bed, handcuffed her, tied her with rope and padlocks, and held a knife on her at times during the 45-minute encounter. She also told Bristol about Ermert gagging her and her plea for Ermert to stop because she did not want to participate. While Ermert loosened her restraints, he continued to hit her and place clothes pins on sensitive parts of her body. Ermert then untied her and demanded she orally copulate him while she was still handcuffed and the ropes with locks were still dangling from her feet. She did so because she was scared and wanted out of the situation.

> The officers took photographs of the marks on Holman's body.
>
> Afterwards, Bristol went to Ermert's apartment and searched his bedroom, finding the described box in his closet. Ermert was subsequently arrested and charged by information with false imprisonment by violence and forcible oral copulation with Holman. [footnote omitted].
>
> Holman testified she was in custody at the time of trial for a parole violation in a drug case and was a prostitute, a drug addict and a long-time friend of Ermert's. Although she did not have a prostitute/client relationship with Ermert, he gave her money and drugs when she needed them. She did not want to be at the trial and was reluctant to testify against Ermert.
>
> Led as a hostile witness, Holman talked about the encounter with Ermert the night of October 10 or 11, 1995.

Lodgment 2, pp. 4-5.

The Court of Appeal's opinion further stated that:

> Holman did not immediately report the incident. She did so only after her boyfriend got upset about the welt marks on her "butt and chest" and he went out looking for Ermert. She volunteered the information about the incident to a police officer she saw on the street, but declined to press charges. Other police officers came to her home and asked her to go downtown to make a report, but she refused. After they came to her home again, her boyfriend took her downtown, where she gave a detailed statement and allowed the police to photograph her injuries, which included marks and welts on her back and buttocks, a cut inside her mouth and

marks on her upper torso. Although Holman admitted she had told police Ermert had shown her a knife in the box during the incident, she retracted that statement at trial, saying she had exaggerated her earlier statement about the knife.

Holman's testimony...varied at trial depending on whether the prosecutor or defense attorney was asking the questions. When asked by defense counsel about the incident, Holman said she was fearful because she was on drugs and was paranoid. She felt she could have left Ermert's apartment if she had not been tied up. She gave oral sex because Ermert merely asked for it. She also stated the police had her telephone Ermert while she was at the police station so the call could be tape recorded in an attempt to gather evidence against him. Holman said Ermert confirmed at that time that she could have left any time she wanted to do so.

On redirect, Holman said she had talked with defense counsel two times a few days before trial. She conceded that although she was difficult to scare because of her life experiences and profession, she was scared during the incident with Ermert. Anytime she had had sex with him during the previous five years she had always been high on drugs and this was the only time she was frightened. Although she did not think Ermert wanted to hurt her, she performed oral sex because she was scared and nervous and wanted to get out of there.

After a brief chamber conference [footnote omitted], Holman continued on redirect to relate that Ermert did not like her boyfriend, whom he described as "a drunk asshole." The night of the encounter, before Holman was tied and gagged, Ermert mentioned again that

she had "dropped him for a nigger." On recross, Holman testified Ermert made no threats that night and did not force her to have oral sex.

Over heresay objections, Detective Bristol testified to the statements Holman had made when she was contacted during the investigation of this matter which are noted above. [footnote omitted].

Two witnesses also testified in the prosecution case as to prior similar acts with Ermert. [footnote omitted] Michelle Whitish, a prostitute who works El Cajon Boulevard, and who had suffered prior drug convictions, testified that on a night in January 1992, before she became a prostitute, she was walking near El Cajon Boulevard to a friend's motel at around 9:15 a.m. when Ermert jumped out from behind some bushes and attacked her. He put a knife to her side, forced her into his truck and began driving. He made her lay down on the seat with her head near his lap and demanded she orally copulate him. He had the knife to her throat, so she complied. Ermert told her he would not hurt her.

He then stopped the truck and handcuffed her hands behind her back. Whitish was crying. Ermert vacillated several times between telling her to "shut up" and telling her it was okay to cry. He hit her in the face and punched her in the stomach about five times. Whitish was very frightened.

Before Whitish testified further, the court admonished the jury that Ermert was not charged with the incident involving Whitish and give it an instruction that her testimony was being introduced only for the limited purpose of:

> determining if it tends to show a characteristic, method or plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show a clear connection between the other offense and the one in which the defendant is accused so that it may be inferred that if defendant committed the other offense, then he also committed the . . . crimes charged in this case.

The court cautioned the jury it could not use such evidence to prove that Ermert was a person of bad character or that he had a disposition to commit crimes. The jury could only use Whitish's testimony in the limited manner described.

Whitish continued her testimony, describing how Ermert reached into the camper portion of the truck and pulled a ball gag from a gym bag. He put the gag in her mouth and also tied a cloth around her mouth and head. He then removed the gag and made Whitish orally copulate him again. Later, Ermert attempted to have sexual intercourse with Whitish in the front seat while she was still handcuffed. His attempts, which lasted about 20 minutes, were painful to Whitish, who said Ermert's eyes were "shining, like he enjoyed it." The total ordeal lasted about two hours, after which Ermert drove Whitish back to the motel where she was living, removed the handcuffs, put away the knife and let her out of the truck.

Whitish did not report the incident right away because she had warrants out for her arrest,

she did not get the truck's license plate number and she was afraid the authorities would take her child. The next day she made a full report, but refused to go to the hospital for an examination. Ermert was never arrested and charged for the crimes against Whitish.

Cynthia Ann Hughes, another prostitute and drug user, also testified about other criminal conduct involving Ermert. At about 10:30 p.m. one night in May 1992, Hughes was approached by Ermert in his truck while she was walking on El Cajon Boulevard. He asked her for a date to include a "half and half," which Hughes understood to be a "blow job and sex both." They negotiated for a price of $40 for the car date Ermert wanted, and he drove to the agreed upon spot in a parking lot across the street from a popular bar. Once at the spot, Ermert escorted Hughes to the back of the camper portion of the truck, put up curtains inside and paid Hughes the $40. Hughes got into the camper, took off her clothes and lay on the bed of the truck since there was no mattress in the back. Fully dressed, Ermert climbed on top of her and pinned her down by holding her arms back and putting his knees on each of her upper arms. Finding this unusual and not being able to move, Hughes became frightened. Ermert then reached over and grabbed a knife out of a gym bag, and traced the knife along Hughes's throat, face and eyes for about five minutes. During that time he had a "sadistic" look on his face and kept telling her to "Shut up, don't scream, don't say a word and I won't hurt you. Just shut up." Hughes repeatedly stated, "Oh, God, don't kill me. Don't hurt me, you know. This was not part of the agreement." When Hughes refused to roll over on her stomach, again telling Ermert about her boyfriend nearby, he let her up and demanded his money back. She immediately

ran screaming into the street and flagged down a police officer. Upset, but relieved to have escaped, Hughes told the officer about the 25- to 30-minute ordeal. Ermert, who had driven off, was apprehended a short time later.

After a lengthy break in the proceedings, [footnote omitted] the defense put on its case. Ermert's roommate testified that he was home the night of the incident involving Holman but did not hear anyone yelling or crying. Further questioning revealed he had come home at 10 or 11 p.m. that night and was sleeping at the 2 a.m. time the incident purportedly occurred. His bedroom was separated by a shared bathroom from Ermert's bedroom. Although the roommate was a light to medium sleeper, he could not hear noise from the television set if Ermert was watching it in the other room.

A private investigator employed by the defense also testified for Ermert. When he talked with Holman in the company of defense counsel, at a detention facility in January 1996, Holman told him she had consented to being tied up and to the oral copulation during the incident in question just as she had done on other occasions. She gave her statements to the police about this incident because the police were harassing her on the street, because she was afraid of her boyfriend, and because she was angry with Ermert. She felt it was the only way to explain the marks on her body to her boyfriend.

Lodgment 2, pp. 8-14.[1]

---

[1] Absent a sufficiency of the evidence claim, the Court would rely upon the facts found by the California Court of Appeal pursuant to 28 U.S.C. § 2254(e). See Parke v. Raley, 506

U.S. 20, 35-36 (1992) (questions of historical fact, including inferences properly drawn from such facts, are entitled to statutory presumption of correctness); Sumner v. Mata, 449 U.S. 539, 545-47 (1981) (stating that deference is owed to findings of both state trial and appellate courts); Tinsley v. Borg, 895 F.2d 520, 524-26 (9th Cir. 1990) (factual findings of both state trial and state appellate courts are entitled to presumption of correctness on federal habeas corpus review). Because petitioner challenges the sufficiency of the evidence, however, this Court has conducted an independent review of the state court record. See Jones v. Wood, 114 F.3d 1002, 1013-14 (9th Cir. 1997). For purposes of petitioner's insufficiency of the evidence claim, this Court "view[s] the evidence in the light most favorable to the prosecution...." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

LEGAL STANDARD

The provisions of the Antiterrorism and Effective Death Penalty ACT ("AEDPA") apply to petitions for writs of habeas corpus filed in federal court after April 24, 1996. Lindh v. Murphy, 521 U.S. 320 (1997). Since petitioner filed this case on December 10, 1998, AEDPA applies.

Title 28, United States Code § 2254(a) defines the scope of review for federal habeas corpus claims:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988).

A federal habeas corpus petition must challenge a deprivation of one or more federal rights to present a cognizable claim pursuant to § 2254. A state's interpretation of its laws or rules provides no basis for federal habeas corpus relief because no federal constitution question arises. Estelle v. McGuire, 502 U.S. 62, 68 (1991). Under § 2254, habeas

corpus proceedings measure state convictions against federal constitutional requirements. A federal district court does "not sit as a 'super' state supreme court" with general supervisory authority over the proper application of state law. Smith v. McCotter, 786 F.2d 697, 700 (5th Cir. 1986); see Lewis v. Jeffers, 497 U.S. 764, 780 (1990). However, federal courts may intervene in state judicial proceedings to correct errors of federal constitutional magnitude. Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir.l 989).

The AEDPA "worked substantial changes to the law of habeas corpus." Moore v. Calderon, 1108 F.3d 261, 263 (3rd Cir.), cert. denied, 521 U.S. 1111 (1997). Most relevant to this case are the changes to 28 U.S.C. § 2254(d) which reads:

> (d) An application of a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claims that was adjudicated on the merits in State court proceedings unless the adjudication of the claim- -
>
> (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law, as determined by

the Supreme Court of the United States; or

(2) resulted in a decision that was based on unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)

The Ninth Circuit recently interpreted the terms "contrary to," and "unreasonable application of," as used in § 2254(d)(1). See Davis v. Kramer, 167 F.3d 494 (9th Cir. 1999). The Davis court established that the two terms, "...reflect the same general requirement... to follow the law as explicated by the Supreme Court." Id. at 500. The Court explained that since the meaning and the purpose of the terms are the same, the main objective of the terminology, no matter which word is used, is to ensure that the state court follows the law of the land. "[A] state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required." Id.

DISCUSSION

A. Admission of Unduly Prejudicial Evidence

Petitioner, in his first claim for relief, contends that he was denied due process of law when the trial court admitted unduly prejudicial evidence of other acts not relevant to an essential element of the crime, specifically, the introduction of testimony of two witnesses, Whitish and Hughes.

Federal courts may only consider a federal habeas petition where the petitioner's conviction violated constitutional norms. Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). A petitioner who challenges a state court's procedural or evidentiary hearing is not entitled federal habeaus review unless 'the ruling violates federal law by either infringing on a federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process." Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995), citing Pulley v. Harris, 465 U.S. 37, 41 (1984); Jammal 926 F.2d at 919-20; Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986). Consequently, a federal court cannot disturb a state court's decision to admit evidence of prior bad acts unless the admission was arbitrary or "so prejudicial that

it rendered the trial fundamentally unfair." Walters, 45 F.3d at 1357.

In Walters, the Ninth Circuit affirmed the state court's admission of evidence of the defendant's similar prior convictions as relevant to the issue of intent. Id. The court noted that the danger of unfair prejudice was reduced by the use of a limiting instruction explaining that the jury should view the evidence "only to show 'motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident' and could not be used to show Walters' bad character." Id. at 1357-58. The Ninth Circuit also noted that the admission of similar evidence regarding a prior sexual assault under Fed. R. Evid. 404(b) was upheld by the court "when the prior act was not too remote in time and the trial court gave a similar limiting instruction." Id. at 1358, citing United States v. Sneezer, 983 F.2d 920, 924 (9th Cir. 1992) (per curiam), cert. denied, 510 U.S. 836 (1993).

In the instant case, the trial court admitted the testimony of Whitish and Hughes pursuant to Cal. Evid. Code §§ 1101 and 1108, finding it relevant to show a common plan or scheme going to a material fact or element of the crime charged. The Court of Appeal affirmed that decision holding

that the testimony was properly admitted to show that "Ermert could not reasonably and in good faith believe Holman had consented," petitioner's primary defense. Lodgment 2, p. 23. The trial court also used a limiting instruction requiring the jury to only use the testimony of Whitish and Hughes for purposes of establishing whether such evidence "tends to shows a characteristic, method or plan or scheme" and admonishing it to not use the testimony to prove petitioner was of bad character or had a disposition to commit crimes. Id. p. 11.

Petitioner contends that the testimony of Whitish and Hughes is not relevant to any element of the crimes charged. Respondent asserts that, as the trial court found, the evidence was relevant to show lack of consent by the victim due to the similarity between the incidents about which both witnesses testified and the crimes charged. However, the Court of Appeal's decision, according to petitioner, relied solely upon Cal. Evid. Code § 1108(a), which does not require similarity as long the incidents concern sexual misconduct. Thus, petitioner contends that the Court of Appeal affirmed the trial court's decision to admit the evidence as relevant to show propensity to commit a crime involving sexual misconduct,

and not to establish lack of consent.

Petitioner cites to a Ninth Circuit decision where the court concluded that evidence irrelevant to any issue in the case and offered only to establish predisposition violated the defendant's constitutional right to due process of law. McKinney v. Rees, 993 F.2d 1378, 1385-86 (9th Cir. 1993). Petitioner contends that because the testimony by both witnesses was not relevant to any element, it must have been admitted only to establish predisposition. Petitioner further disputes that the holding in Jammal, 926 F.2d at 920, is dispositive here. There, the Ninth Circuit found that due process is violated only where no other inferences can be drawn, other than impermissible ones. According to petitioner, "the only inference that can be gleaned from the 'other acts' evidence admitted against petitioner is the improper one of disposition." (Trav., p.7).

This Court disagrees. The testimony of Whitish and Hughes consisted of other instances that were strikingly similar to the crimes charged. Each witness testified that the acts were done without consent. The victim's testimony was inconsistent as to whether she had consented freely. Petitioner's main defense was that the victim had consented.

This Court finds that the testimony presented was relevant to show a common plan or scheme going to the victim's lack of consent. As petitioner notes in his petition, "[e]vidence of character, disposition and reputation 'is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge," (Petition, p. 15, quoting, Michelson v. United States, 335 U.S. 469, 475-76 (1948)). Petitioner's argument that the extremely prejudicial character evidence presented by the prosecution was irrelevant to any issue in the case flies in the face of this proposition.

In addition, this Court notes that the trial court cautioned the jury with a limiting instruction requiring the jury to view the testimony only to determine if it tends to show a common plan or scheme in the commission of other similar acts which may infer that petitioner had also committed the crimes charged. The trial court further cautioned the jury it could not use such evidence to prove that petitioner was a person of bad character or that he had a disposition to commit crimes. This limitation, coupled with the relevancy of the

evidence presented, is sufficient to avoid a constitutional violation of due process.

After a through review of the testimony of the two witnesses, this Court finds that the testimony is relevant and admitted as evidence going to the issue of consent. Coupled with the use of the limiting instruction, this Court finds that the trial court's admission of the testimony by Whitish and Hughes for the purpose of showing a common plan or scheme going to the victim's lack of consent, did not render petitioner's trial fundamentally unfair. Therefore, for the reasons set forth above, this Court recommends that petitioner's due process claim based on the admission of prejudicial evidence be DENIED.

B. Insufficiency of Evidence

Petitioner's second claim for relief alleges that he was convicted on insufficient evidence to support the jury's finding of guilt. A state prisoner who alleges that the evidence presented at trial was insufficient to lead a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim. Jackson v. Virginia, 443 U.S. 307, 321 (1979). Where a state prisoner claims, under 28 U.S.C. § 2254, that he is entitled to relief due to the insufficiency of the

evidence, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Riggins, 40 F.3d 1055, 1057 (9th Cir. 1994), quoting Jackson, 443 U.S. at 319.

Petitioner first request, in his supplemental traverse, that the Court defer issuance of its report and recommendation until after the California Supreme Court issues rulings in two pending cases now before it. (Suppl. Trav., p.2). Those two cases, according to petitioner, involve a determination as to what standard of review a state appellate court must apply in determining whether evidence was sufficient to sustain a jury's verdict. (Id.). However, this Court's decision will not be affected by the California Supreme Court's decision on either of these two cases. This Court's analysis includes a *de novo* review of the record before it. It does not matter how the California Court of Appeal reviewed the record in making its determination to deny petitioner's claims on appeal. Deference cannot be given to the Court of Appeal's findings of facts when the court is faced with an insufficency of evidence claim. See Jones v.

Wood, 114 F.3d 1002, 1013-14 (9th Cir. 1997).

Even assuming the standard applied by the Court of Appeal impacts this Court's determination, the standard applied by the California Court of Appeal in examining petitioner's claim of insufficiency of the evidence was correct. In determining petitioner's insufficiency of the evidence claim, the court applied a *de novo* review "based upon the entire record" and "reviewed the facts adduced at trial in full and in the light most favorable to the judgment, drawing all inferences in support of the judgment." Lodgment 2, p.3. The court also considered "whether 'any rational trier of fact could have found the essential elements of [Ermert's crimes] beyond a reasonable doubt.'" Id. Based on this standard, the court found that the evidence supported the jury's finding that petitioner was guilty of falsely imprisoning Holman by violence or menace. In addition, the court determined that the evidence was sufficient for a reasonable jury to "have concluded that Holman also orally copulated Ermert because of fear of his sadistic conduct." (Id., p. 16). The Court of Appeal's opinion is based on an application of law that is sufficiently similar to the standard utilized by the United States Supreme Court in determining such claims. See Jackson, 443

U.S. 307. Thus, the California Court of Appeal applied the correct standard in reviewing petitioner's insufficiency of evidence claim. Accordingly, petitioner's request to stay the issuance of the Court's report and recommendation pending the California Supreme Court's decision in two particular cases is DENIED.

Petitioner contends that the government failed to present sufficient evidence for the jury to find beyond a reasonable doubt that the victim had not consented to the acts perpetrated upon her by petitioner. Petitioner points to the fact that the victim testified she consented to being constrained and knew she was free to leave but chose not to do so. In addition, petitioner argues that the victim testified she willingly orally copulated petitioner. Thus, according to petitioner, the jury had insufficient evidence upon which to find beyond a reasonable doubt, that petitioner was guilty of the crimes charged.

Respondent contends that Holman's testimony "was impeached by her own testimony." (Suppl. Ans. P. 6). Respondent notes that Holman did not want to testify, had a long-time friendship with petitioner, and testified at trial as a hostile witness. (Id.). Thus, according to respondent,

Holman's attempts to mitigate her prior statements were "to no avail." (Id.).

The evidence presented at trial was sufficient to support the jury's verdict. There was testimony from an investigating officer regarding statements made by Holman a few days after the incident occurred. Holman testified that she was frightened and acquiesced to petitioner's demands in order to leave the scene as quickly as possible. In addition, Holman's trial testimony was inconsistent depending on whether defense counsel or the prosecutor questioned her. The jury was informed of the circumstances surrounding Holman's testimony, including her unwillingness to testify and her prior relationship with petitioner. It is not unreasonable for a jury to disregard all or any portion of Holman's testimony. Without Holman's testimony, the evidence was sufficient to support the jury's conclusion that the acts were committed without her consent.

Viewing the evidence presented in the light most favorable to the prosecution, this Court finds that any rational trier of fact could find petitioner guilty of the crimes charged beyond a reasonable doubt. Accordingly, this Court recommends that petitioner's insufficient evidence claim be

DENIED.

CONCLUSION

For the reasons set forth above this Court recommends that the petition for writ of habeas corpus be **DENIED**. This Report and Recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). On or before January 7, 2000, any party may file written objections with the court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation." On or before January 28, 2000, any reply to the objections shall be filed and served on the opposing party. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: November 5, 1999

S/S
JOHN A. HOUSTON
United States Magistrate Judge

cc: Judge Miller
All parties of record